

**EXHIBIT
D**

**FIFTH DIVISION
MERCIER, C. J.,
MCFADDEN, P. J., and RICKMAN, J.**

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September 17, 2024

**NOT TO BE OFFICIALLY
REPORTED**

In the Court of Appeals of Georgia

A24A1099. DODD v. WEST.

MCFADDEN, Presiding Judge.

This appeal arises from the denial of a motion for attorney fees and litigation expenses under OCGA § 9-11-68, the offer of settlement statute. At issue is the sufficiency of the settlement offer to sustain an award under that statute. The trial court correctly ruled that the settlement offer did not satisfy the statutory requirement that the offer state whether “attorney fees or other expenses” are part of both “the proposal” and “the legal claim.” See OCGA § 9-11-68 (a) (7). So we affirm.

1. *Facts and procedural posture*

Appellant Kimberly Dodd sued Appellee James West, alleging that he had negligently caused a motor vehicle collision in which she was injured. Dodd later

served West with an offer to settle the lawsuit for \$20,000. The offer referenced OCGA § 9-11-68. West rejected it, and the case proceeded to a jury trial. The jury returned a verdict in favor of Dodd, awarding her damages in the amount of \$25,130. The trial court entered judgment in that amount.

On the basis that the judgment exceeded 125 percent of the rejected settlement offer and so exceeded the threshold set out at OCGA § 9-11-68 (b) (2), Dodd filed a motion for attorney fees in the amount of \$204,845 and litigation expenses in the amount of \$25,407. The trial court denied the motion on the ground that Dodd's settlement proposal did not satisfy OCGA § 9-11-68 (a) (7): the offer did state that the proposed settlement included attorney fees and other expenses, but it did not state whether attorney fees or other expenses were part of the legal claim. Dodd appeals.

2. *OCGA § 9-11-68 (a) (7)*

“OCGA § 9-11-68[is] commonly called the ‘offer of settlement’ statute. . . . [T]he clear purpose of the statute is to encourage litigants in tort cases to make and accept good faith settlement proposals in order to avoid unnecessary litigation[.]” *CaseMetrix, LLC v. Sherpa Web Studios*, 353 Ga. App. 768, 771 (1) (839

SE2d 256) (2020) (citation and punctuation omitted). OCGA § 9-11-68 (b) (2)

provides:

If a plaintiff makes an offer of settlement which is rejected by the defendant and the plaintiff recovers a final judgment in an amount greater than 125 percent of such offer of settlement, the plaintiff shall be entitled to recover reasonable attorney's fees and expenses of litigation incurred by the plaintiff or on the plaintiff's behalf from the date of the rejection of the offer of settlement through the entry of judgment.

“For a plaintiff seeking to recover under this provision, the . . . prerequisites for recovery [include] the making of a good faith offer of settlement that complied with the requirements of OCGA § 9-11-68 (a)[,] which sets forth the procedural requirements for invoking the statute[.]” *Junior v. Graham*, 313 Ga. 420, 424 (2) (a) (870 SE2d 378) (2022). One of those requirements is that “[a]ny offer [of settlement] under this Code section *must* . . . [s]tate whether the proposal includes attorney’s fees or other expenses *and* whether attorney’s fees or other expenses are part of the legal claim[.]” OCGA § 9-11-68 (a) (7) (emphasis supplied).

Dodd’s settlement offer stated that it included attorney fees and other expenses, but it failed to state whether such attorney fees or other expenses are part of the legal claim. Despite this failure, Dodd argues that she nevertheless complied with the requirements of the offer of settlement statute. We disagree.

In interpreting OCGA §§ 9-11-68 . . . , we must presume that the General Assembly meant what it said and said what it meant. To that end, we must afford the statutory text its plain and ordinary meaning, we must view the statutory text in the context in which it appears, and we must read the statutory text in its most natural and reasonable way, as an ordinary speaker of the English language would.

Junior, supra at 423 (2) (a) (citation and punctuation omitted). “Further, when the language of a statute is plain and susceptible of only one natural and reasonable construction, courts must construe the statute accordingly. Finally, because any statute that provides for the award of attorney fees is in derogation of common law, it must be strictly construed against the award of such damages.” *CaseMetrix*, supra at 770-771 (1) (citation and punctuation omitted).

So construed, the language of OCGA § 9-11-68 (a) (7) plainly provides that a settlement offer *must* state whether it includes attorney fees or other expenses *and* whether attorney fees or other expenses are part of the legal claim. “[T]he plain meaning of [the word] ‘must’ is a command, synonymous with ‘shall.’” *State v. Henderson*, 263 Ga. 508, 510 (436 SE2d 209) (1993). See also *Clayton County Bd. of Ed. v. Wilmer*, 325 Ga. App. 637, 643 (1) (753 SE2d 459) (2014) (“shall” and “must” are synonymous words of command when used in a statute). Moreover, the statements about attorney fees and expenses set forth in OCGA § 9-11-68 (a) (7) “are connected

by the conjunction ‘and,’ so that it is beyond peradventure that both [statements] are required[.]” *Moorehead v. Counts*, 130 Ga. App. 453, 455 (1) (203 SE2d 553) (1973). See also *Calhoun v. Couch*, 232 Ga. 467, 468 (1) (207 SE2d 455) (1974) (use of conjunction “and” means that both conditions precedent must be met). The only natural and reasonable construction of this plain statutory language is that a settlement offer made pursuant to OCGA § 9-11-68 is required to include both statements concerning attorney fees and other expenses. Given this clear and unambiguous text, “our search for statutory meaning is at an end.” *Deal v. Coleman*, 294 Ga. 170, 173 (1) (a) (751 SE2d 337) (2013).

Dodd cites *Cajun Contractors v. Peachtree Prop. Sub*, 360 Ga. App. 390 (861 SE2d 222) (2021) and *Chadwick v. Brazell*, 331 Ga. App. 373 (771 SE2d 75) (2015), to support her argument that she was not required to comply with this plain statutory language because “there was not a claim for fees/costs raised in the litigation,” so a statement in the settlement offer about such fees and costs would have been superfluous. While it is true that the complaint did not include a claim for attorney fees, it did request that Dodd “recover costs.” And in the consolidated pretrial order,

the defendant's outline of the case indicated that one of the issues for determination by the jury was attorney's fees under OCGA § 13-6-11.

Nevertheless, pretermitted whether Dodd is correct that attorney fees and costs were not "raised in the litigation," her reliance on *Cajun Contractors* and *Chadwick* is misplaced. Those cases involved a different provision of OCGA § 9-11-68 (a) — subsection (a) (6) — which is materially different from subsection (a) (7). "OCGA § 9-11-68 (a) (6) provides that an offer of settlement must 'state with particularity the amount proposed to settle a claim for punitive damages, *if any*.'" *Cajun Contractors*, supra at 405 (2) (a) (punctuation omitted; emphasis supplied). As this court explained in *Chadwick*:

Because the legislature chose to include in the list of requirements for a valid written offer a specific reference to punitive damages, the phrase "if any" could reasonably be interpreted only as modifying "a claim for punitive damages," which is the antecedent for the modifier. If there is no claim for punitive damages, a party can ignore the requirement of subsection (a) (6). But if there is a claim for punitive damages, the written offer must include the amount proposed to settle that claim with particularity.

Chadwick, supra at 376-377 (2) (punctuation, footnote, and emphasis omitted).

Unlike the use of the "if any" modifier for a claim of punitive damages in subsection (a) (6), subsection (a) (7) does not include that modifier for a claim of

attorney fees or other expenses. “If the General Assembly had intended to [make both required statements of subsection (a) (7) apply only “*if any*” claim of attorney fees or expenses had been made, subsection (a) (6)] shows that it knew how to do so. We must presume that its failure to do so was a matter of considered choice.” *Fair v. State*, 284 Ga. 165, 168 (2) (b) (664 SE2d 227) (2008) (citations and punctuation omitted). So unlike the holdings in *Cajun Contractors* and *Chadwick* that a party can ignore the requirement of subsection (a) (6) if there is no claim for punitive damages, a party cannot ignore the requirements of subsection (a) (7) if there is no claim for attorney fees or other expenses.

Because Dodd’s offer of settlement did not include the mandatory statement as to whether attorney fees or other expenses are part of her legal claim, the offer was insufficient to sustain an award of attorney fees and litigation expenses under OCGA § 9-11-68. See *Eichenblatt v. Piedmont/Maple, LLC*, 358 Ga. App. 234, 237-240 (1) (854 SE2d 572) (2021) (settlement offer that failed to comply with the requirements of OCGA § 9-11-68 (a) provided no basis for an award of attorney fees and litigation expenses); *Tiller v. RJJB Assoc.*, 331 Ga. App. 622, 627 (1) (c) (770 SE2d 883) (2015)

(same). Accordingly, we affirm the trial court's denial of the motion for attorney fees and expenses on that basis.

Judgment affirmed. Mercier, C. J., and Rickman, J., concur.